



Re-Individualizing the Criminal Sanctions of Deprivation of Liberty in the European Union

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Abstract: The conducted research concerns the situations in which, according to the current legislation in Romania, it is necessary the re-individualization of criminal sanctions applied to Romanian citizens in other EU member state. Previously, this issue was the subject of other investigations that have resulted in the publication in separate section of a master course, and other studies or articles in journals or international conferences. The study is based on the examination of the internal legal standards, compared to those in the European legal act framework, with specific illustrative cases for practice. The conclusions highlight the need for transposing the European legislative act into the national law and the approximation of criminal laws of Member States, currently there are major differences in the nature and quantum of sanctions. The study is useful for researchers in the field, master students and the personnel engaged in the actual legal practice, namely judges, prosecutors or police investigators frames court. The work contributes to improving the national legislation in the recognition of criminal sanctions domain in the European Union, the originality consists of identifying the situations of concrete judicial cooperation between Romania and in other Member States and proposing concrete ways of solving them.

Keywords: deprivation of liberty; re-individualization; European legislative act

1. Introduction

One of the priorities set by the European Union is to achieve an area of freedom, security and justice on its territory. The primary objective could be achieved only under the condition of improving the system of judicial and police cooperation, cooperation that has to ultimately provide all citizens a high level of security. The execution of non-custodial sentences in another state, other than the convicting one, has imposed in time, based on the finding that in this way the chances of social reintegration of the convicted person increase, as it allows the preservation of family, linguistic, cultural and other connections, and it improves the surveillance of probation measures and alternative sanctions, the immediate

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purpose being to prevent relapse and ensure adequate protection of potential victims.

Of course the execution of some criminal law penalties of deprivation of liberty, in a State other than the convicting one, concerns the State of whose nationality is the sentenced one, or in the State where it resides, home or family.

Given the differences between the laws of Member States, in order to implement a unified position on this matter, it was necessary to adopt a new European legislative act. Under these circumstances, as the Council of Europe Convention of 30 November 1964 on the supervision of convicted criminals released on parole or conditional release, under certain circumstances, it was only ratified by 12 EU countries (in some cases with many reservations), thus it was adopted Framework Decision 2008/947/JHA of 27 November 2008 on the principle of mutual recognition in case of judgments and probation decisions with the supervision of probation measures and alternative sanctions.¹

The European legislative act establishes, first, as it can be recognized and enforced such sanction in another Member State than the convicting one, when the sanction corresponds to the duration and nature of enforcement state legislation. Secondly, when the criminal sanction applied in the sentencing state, it does not correspond to the duration and nature of the executing Member State, it (the executing Member State) may, under certain conditions, through its judicial authorities empowered by the internal law, re-individualize this sanction, so that it may correspond to its legislation. Granting this possibility to the Member State of enforcement was necessary considering the differences between the legislations of the Member States.

2. Types of Probation Measures and Alternative Sanctions. Comparative Analysis with Reference to the Romanian Legislation

According to the depositions of the European legislative act, mutual recognition and supervision of suspended convictions, of convictions with a delayed penalty, of alternative sanctions and decisions on conditional release aimed at increasing the opportunities for social reintegration of the convicted person, allowing it to preserve family, linguistic, cultural and other connections, but at the same time

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improving monitoring the compliance with probation measures and alternative sanctions in order to prevent relapse.

As it was normal, by the provisions of the European legislative act, it is acknowledged that in the current legislation of the Member States there are several types of probation measures and alternative penalties that may be common to the Member States. Thus, according to the European legislative act, the probation measures which must be, in principle mandatorily supervised, include among others, provisions concerning:

- a) behavior (such as the obligation to stop drinking);
- b) residence (such as the obligation to change residence for cases of domestic violence);
- c) education and training (such as the obligation to follow “safe driving hours”);
- d) leisure activities (such as the obligation to stop practicing a particular sport or participating in it);
- e) limitations on how to conduct a professional activity, such as the obligation to seek professional activity in another environment; this obligation does not include supervision of compliance with loss of the right to practice which derives from the sanction.

On the other hand, the same act identifies and nominates therein, types of probation measures and alternative penalties to which they relate. This nomination has become a necessity due to the diversity of probation measures and alternative sanctions laws existing in the Member States.

Types of probation measures and alternative sanctions. Comparative examination reported in the Romanian law depositions. Judicial individualization of these criminal sanctions. We specify that the content of European legislative act makes no distinction between probation and alternative sanctions measures. Thus, in accordance with the European legislative act¹, the Member States should consider the following types of probation and alternative sanctions measures:

1. The obligation of a convicted person to inform a certain authority on any change of residence or work place²

¹*Ibidem*, pp. 28-29, article 4 of Framework Decision 2008/947/JHA.

²2008/947/JHA Council Framework Decision, article 4, paragraph (1), letter a).

The obligation to announce in advance any change of domicile, residence or dwelling and any movement exceeding eight days provided for in article 863 paragraph (1), letter b) Penal Code. This supervision measure is more restrictive (severe) than the one mentioned in the European legislative act, a decision being taking only by the convict serving a sentence with the execution on suspension under supervision.

Also, in a resembling editorial, namely the obligation of not changing the residence without the consent of the judicial body that ordered the obligation measure of not leaving the city or the obligation of not leaving the country, as provided in article 145 paragraph (1), letter c) Criminal Processual Code.

We note that in its complexity, this measure of probation or alternative sanction as defined by the European legislative act has a correspondent in our legislation in a measure of supervision and in a requirement that a defendant must follow when it is being taken against him a preventive measure. The obligation of a person convicted to inform certain authority on any change of employment represents another supervision measure in our legislation as provided in article 863 paragraph (1), letter c) Criminal Code.

Within this complex process the re-individualization of this criminal sanction, the provisions of the European legislative act mentioned above, can be applied by the courts in the country only if they represent a measure of supervision ordered under a court decision of convicting the defendant with the suspension of executing the sentence under supervision. A possible request of the acknowledgement of this measure without the existence of a conviction of the defendant will make impossible its recognition and enforcement in the country.

The re-individualization issue of these supervision measures may occur when its duration established by the competent court in the Member State exceeds the expected duration provided by our legislation. Thus, the interpretation of the depositions of article 861, paragraph (1), letter a) of the Penal Code and the provisions of article 862, paragraph (1) of the Penal Code, the supervision measures mentioned above can be arranged during the test period, which is composed of applied quantum of imprisonment, to which the court may add a period between 2 and 5 years, which means that in our laws the maximum duration of the arrangement of these supervision measures is 9 years (we counted the quantum of maximum penalty of four years, to which we have added a maximum time interval which can be set by the court, that is of five years). In case the

measure is ordered by the competent Member State for a period of 10 years, the Romanian competent court within the re-individualization process will set a maximum, lower period that is of 9 years.

Re-individualization, in this case, can be held under the provisions of article 9, paragraph (2) of the European legislative act, which provides that, in case of probation measure, the alternative sanction or test period have been adapted since their duration exceeded the maximum duration prescribed by the state law enforcement, the duration of the adapted probation measure, of the adapted alternative sanction or the adapted probation term cannot be adjusted below the maximum duration provided for equivalent offenses by the executing state law.

Although the European legislator uses the term *adaptation*, we believe that in such situations the use of the term *re-individualization* is more correct.

In the judicial practice it can occur in another situation as well, namely one in which the alternative sanction applied in the convicting Member State provides such measure (regardless of denomination, it is important that it is applied in addition to the alternative sanction), but in lower limits to those provided in our legislation. In this situation, how does the competent Romanian court will proceed, because no European legislative act provides express provision? We appreciate that in such situation, according to our law, the minimum limit for applying one of the two measures, or both, can be of 2 years and 15 days. In the case where, the period of appliance of the measure established by the court from the convicting Member State is of two years and 14 days or less, the Romanian competent court within the process of re-individualization, it will establish a period of 2 years and 15 days, that is the minimum length of time for which this measure can be applied.

2. The obligation of not entering in certain localities, places or areas defined in the issuing or executing convicting status¹

In our legislation it is provided only the interdiction of being in certain localities. Thus, this measure is provided partially in article 112, letter d) Penal Code, as a safety measure may be ordered, in accordance with the depositions of article 116 of the Penal Code, when the person sentenced to imprisonment of at least one year has been convicted of other offenses, if the court finds that his presence in the town where he committed the crime or in other places where he represents a serious a

¹2008/947/JHA Council Framework Decision, article 4, paragraph (1), letter b).

danger to society. The measure may be taken for a period of up to 5 years, which may be extended.

We appreciate that in the re-individualization process of this sanction of criminal law, in the legal practice there are several difficulties. First, we believe that when the European legislator provided and the enforcement state strictly referred to the re-individualization of criminal law sanction by the judicial authority of the executing State and in not the convicting one, for the reason that the sentencing court may not appreciate the prohibition on the person in question the entrance in a certain locality of the executing State. Secondly we should mention that in our legislation, this measure may be ordered only in addition to a sentence, which implicitly assumes that also in the sentencing State the measure must be taken under the same conditions. Consequently, the order of this measure individually, without a penalty to complete cannot be recognized and implicitly enforced in Romania.

In this context, in the re-individualization process of the sanctions of criminal law, the competent court in the country will need to consider certain specific circumstances of each situation individually. Thus, if a court in Italy decides this measure against a Romanian citizen condemned with permanent or temporary residence in Romania, specifically naming the city of Milan, after which this court ruling is recognized by the competent judicial authority in the country, we wonder if it is necessary and in what will consist of the re-individualization of sanction by the competent Romanian court?

We appreciate that in such a situation, taking into account all the circumstances of the offense, the competent court in Romania (considering its membership status of the European Union and the possibility of the Romanian citizens to travel in any EU country), will maintain the interdiction of entering in Milan City, having the possibility of completing also with other cities from Romania.

Re-individualization may cover the issue related to the duration of this measure. Thus, in the situation where the time period set by the Italian judicial authorities for Milan exceeds the expected duration of our legislation, we consider that the Romanian court cannot reduce the maximum set out in our legislation. We argue this view on the grounds that, whatever the circumstances of the offense, the court in the country cannot appreciate the danger of the sentenced person's presence in Milan, the reason for which the duration cannot be modified, in the meaning of reducing it. However, under the recognition and implicitly the enforcement of

criminal law sanction, the court in the country may decide, keeping the sanctions imposed by the Italian court, taking into account other elements as well, as the convicted person does not move to other localities in Romania, localities in which the convicted person may continue the criminal activities for which he was convicted, we refer to the big cities in which the convicted person may commit other crimes of the same kind. However, the re-individualization of this measure is questionable, especially when currently the judicial practice and the doctrine do not provide examples or specific examinations.

3. The obligation on the limitations in terms of leaving the territory of the executing State¹

An obligation regarding a certain limitation in terms of leaving the country territory is not covered in our legislation as a safety measure. But we note that such an obligation is laid down in article 86³ paragraph (3) letter b) of the Penal Code, representing the Romanian legislator concept, an obligation which can be ordered by the court against a physical entity who has been convicted with the suspension of executing the sentence under supervision. The provision that we speak of is not expressly referred to, it results from the interpretation of the mentioned text.

However, this requirement also appears in our legislation as a preventive measure that can be ordered against the defendant in the prosecution [art. 136 paragraph (1), letter d) and article C. 145¹ Criminal Processual Code]

In our law the limitations on leaving the country are provided in the provisions of Law no. 248/2005 with subsequent amendments, on the free movement of Romanian citizens abroad, measures which are to be taken only by the court.

4. Provisions relating to behavior, residence, education and training, leisure or containing limitations on how to conduct a professional activity²

Under our law, such provisions are referred to as supervision measures or obligations of the defendant sentenced by the court, as they are mandatory during the term of testing in the case of suspension of the execution of sentence under supervision. Thus, in accordance with article 86³ paragraph (1), letter a) of the Penal Code, the convicted person is required to come, at set data, to the judge assigned with his supervision or to the Probation Service. Also, the convicted person is obliged to perform an activity or follow a course of education or training

¹2008/947/JHA Council Framework Decision, article 4, paragraph (1), letter c).

²2008/947/JHA Council Framework Decision, article 4, paragraph (1), letter d).

[article 86³ paragraph (3), letter a) of the Penal Code.]. Other obligations are set out in article 86³ paragraph (3), letter c) d) and e) of the Penal Code.

However, in accordance with the provisions of article 112, letter c) of the Penal Code, against a person who has committed an offense under the criminal law can take the security measure of prohibition to hold a function or exercise a profession or other occupation.

We note that these provisions in our legislation are safety, surveillance measures or obligations of the convicted person, ordered by the court, that the convict has to undergo during the test period, in case of committing an offense under the law or criminal conviction with conditional suspension of executing the sentence.

The re-individualization of these supervision measures or obligations of the convict, by a Romanian court, may be required in some different cases. Thus, a first re-individualization situation will be achieved when the probation measure or alternative sanction (hereinafter referred to as European legislative act), mentioned above, are ordered by a court of another Member State for a period of time greater than that provided in our legislation. As mentioned previously, the Romanian court, in the re-individualization process of the criminal sanction, will proceed to reduce it to a limit set out in our legislation.

Another example, this time more difficult, occurs when the probation measure or alternative sanctions ordered by the court from the convicting Member State is not provided in our legislation. This time, in the individuation process the Romanian court will replace this measure or penalty with a one closer as effect and duration, as provided in our legislation.

In carrying out this provision they may occur situations in which a measure or a sanction ordered by the court from a convicting Member State cannot be executed in the town where the convicted has the domicile or residence for reasons not attributable to him. Such a situation occurs when the sentencing court, require the defendant to follow certain courses of education or training that cannot be followed in place of residence or domicile, as there are no specialized units in this area. In such a case, the court in the country will establish another institution or company that has in its field training activities similar to those imposed by the sentencing court.

In judicial practice, given the variety of European court decisions, will certainly arise such situations, and others, being each time important the Romanian court's

decision, which must consider the interests of the convict and the community to which he belongs to, the ultimate goal being his social reintegration.

5. The obligation to present at specified times to a specific authority¹

This measure of probation or alternative sanction (as defined in the European legislative act), is provided in our legislation as a supervision means in the article 86³ paragraph (1), letter a) of the Penal Code, and it states that the convict is obliged to present himself at a specific data, to the judge assigned to his supervision or probation, during the test period, in case of his conviction with suspending the execution of the sentence under supervision. Also, this obligation (which is not related to the examined subject), is provided also in the case of preventive measures of the obligation of not leaving the city or country, a situation in which the person is required to appear to the prosecution authority or, where appropriate, to the court whenever called upon.

The re-individualization of this measure will also cover others, only the time duration of its execution, which is linked to the applied criminal sanction. In other words, this measure cannot be executed or re-individualized by the competent Romanian court, except with the sanction of criminal law that follows it.

6. The obligation to avoid contact with certain persons²

In our law, this measure of probation or alternative sanction represents an obligation that is imposed on the convicted person by the court, in case of his conviction with suspending the execution of sentence under supervision, as provided in article 86³, paragraph (3), letter d) of the Penal Code. In the re-individualization process, the Romanian court will not (as the above case) reduce or increase in time that obligation, only in the particular context determined by the size of the applied sentence, which is accompanied by this obligation.

However, we consider that in case of the situation where the re-individualization is required, the court in our country may yet bring additions to this obligation, in the sense that, apart from the persons established by the sentencing court, it may establish others from the area where the person in question resided in Romania or in his entourage.

¹*Ibid.*, article 4, paragraph (1), letter e).

²*Ibid.*, article 4, paragraph (1), letter f).

7. The obligation of avoiding contact with certain objects, that were used or could be used by the convicted person for committing a criminal act¹

This obligation is set out in our legislation in article 86³ paragraph (3), letter e) of the Penal Code and it can be taken by the court against an individual who has been convicted with suspension of executing the sentence under supervision, but it is expressly limited to vehicles.

With the process of re-individualization, we consider that the court will proceed to extending this obligation in relation to other objects, but only in the context of taking into account the criminal penalty that accompanies it. Regarding the duration of criminal sanction imposed by the court of conviction, it can be changed only in the aforementioned general context.

8. The obligation to compensate in terms of financial prejudice caused through crime and / or the obligation to provide a proof for meeting this obligation²

In our law fixing the prejudice caused through an offense represents a mitigating circumstance and also an obligation that the convict must perform during the test period determined by the court, in case of conviction with conditional suspension of executing the sentence. This obligation cannot be re-individualized regarding its quantum, but only as regards the possibility of installment, but only inside the test period.

9. The obligation to provide community service activities³

This requirement may be imposed by the court to the person convicted with suspension of the execution sentence under supervision, in accordance with article 86³, paragraph (3), letter a) of the Penal Code. Also, this requirement may be imposed by the court also to the juvenile who was sentenced to supervised freedom, according article 103 paragraph (3), letter c) of the Penal Code.

10. The obligation to cooperate with a surveillance agent (probation counselor) or a representative of a social service that has responsibilities regarding the convicted persons⁴

¹*Ibid.*, article 4, paragraph (1), letter g).

²*Ibid.*, article 4, paragraph (1), letter h).

³*Ibid.*, article 4, paragraph (1), letter i).

⁴*Ibid.*, article 4, paragraph (1), letter j).

This requirement is in our law, a supervision measure that is provided in article 86³, paragraph (1), letter a) of the Penal Code. It can be re-individualized, but only in terms of its time duration and only with the re-individualization of criminal law sanction which it accompanies.

11. The obligation to undergo therapeutic treatment or detoxification¹

In our law this obligation is provided in article 863 paragraph (3), letter f) of the Penal Code, it and can be ordered by the court in case of conviction with suspended sentence supervision. Its re-individualization can occur under the mentioned above conditions.

3. The Re-individualization of these Types of Sanctions in the European Legislator Concept

Regarding the possibility of re-individualizing the penalty in the executing Member State, the European legal act provides that it can be achieved when the nature or the duration of probation measure or alternative sanction, or the test term are inconsistent with the state law enforcement. If at least one of the conditions mentioned above is fulfilled, the competent authority of the executing State may re-individualize such a sanction in accordance with the nature and duration of probation measures and alternative sanctions or with the duration of the test period which is applied in accordance with its internal law. After re-individualization, the probation measure, the alternative sanction or duration of the test period must be equivalent, as much as possible to those established in the sentencing State. In other words, the re-individualization is achieved by adopting some measures of probation, alternative sanctions or test terms, as similar in nature and duration to those adopted in the sentencing State.

When it was imposed the re-individualization to the probation measure, alternative sanction or test term due to exceeding the maximum duration set by state law of the executing state, the duration of these re-individualized sanctions should not be less than the maximum duration prescribed for offenses equivalent in the executing state law. Meanwhile, the re-individualized measure of probation, alternative sanction of test term should not be more severe or of a longer duration, in relation

¹*Ibid.*, article 4, paragraph (1), letter k).

to nature, than the duration or the initial deadline set by the court of the convicting state.

The normative act provides also the conditions to be met by the Romanian court, regarding the extension of the penalty conversion and of the applicable criteria, namely:

- it will not be related to the findings of facts insofar as they appear, explicitly or implicitly, in the legal decision passed by the sentencing State;
- it will not be able to change a custodial sentence by a pecuniary punishment;
- it will deduct fully the period of deprivation of liberty already executed by the convicted;
- it will not aggravate the criminal situation of the convicted, it will not be bound by the lower limit of the punishment provided by the law of the executing state for the committed offense or offenses.

4. Conclusions and Critical Remarks

The examination highlights that the current internal law provides for the European courts, including the Romanian ones, the possibility of re-individualization of criminal sanctions applied in another country, an EU member. In other words, in our internal law there are no special provisions governing the possibility of re-individualizing the criminal sanctions applied in an EU member state. We note that, at this moment, the European legislative act to which we referred is not transposed into our internal law. Given this situation, we consider necessary few specifications.

Thus, the Lisbon Treaty¹ has brought some changes and additions to the two basic EU treaties, namely the Treaty on European Union and the Treaty of establishing the European Community. According to article 2, paragraph (1), the title of the Treaty establishing the European Community has been replaced by "Treaty on

¹ Lisbon Treaty signed on 13 December 2007. Consolidated version of the Treaty on European Union and the Treaty on functioning the European Union was published in the Official Journal of the European Union C 115 / 1, 09.05.2008. The treaty of Lisbon was ratified by Law no. 13 of February 7, 2008 for ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, published in Official Monitor no. 107 of February 12, 2008.

functioning the European Union". According to the provisions of article 82¹, *"the judicial cooperation in criminal matters within the Union is founded upon the principle of mutual recognition of judgments and judicial decisions and it shall include the approximation of laws, regulations, and administrative provisions of the Member States in the areas referred to in paragraph (2) and article 83"*. At the same time, in order to exercise the powers of the Union, the institutions adopt regulations, directives, decisions, recommendations, and notifications.² In terms of decisions, *"they are mandatory in its entirety."*³

On the other hand, in connection with executing state the obligations deriving from international treaties, to which Romania belongs, the Romanian Constitution provides that *"the Romanian State pledges to fulfill in good faith the obligations that derive from the treaties to which it belongs."*⁴

Meanwhile, in connection with the mandatory implementation of the European legislative acts and their priority in relation to the internal normative acts (in some cases), still the Romanian Constitution, republished, provided: *"Following the accession, the depositions of the constituting treaties of the European Union and other binding community regulations, have priority over the provisions of the national laws, in compliance with the provisions of the Act of Accession"*.⁵

Given the above mentioned provisions, we consider that the depositions of the European legislative act even if they have not been incorporated into our internal law are applicable in Romania as well.

In other words, the European legislative act is currently a legal act into force and it produces legal effects, the application of its provisions on the re-individualization of non-custodial criminal sanctions, are mandatory for Romania and for any EU member state. In these circumstances, the Romanian state, through its competent

¹As shown in the consolidated version of two basic treaties.

²Article 288, paragraph 1 of the consolidated version of the Treaty on functioning the European Union.

³*Ibid.*, article 288, paragraph 4.

⁴The Romanian Constitution, published in Official Monitor no. 233 of 21 November 1991, revised by Law no. 429/2003, law which was approved by national Referendum on 18-19 October 2003 and entered into force on 29 October 2003, its publication in the Official Monitor no. 758 of 29 October 2003 of the Constitutional Court Decision no. 3 of 22 October 2003 for the conformation of the national referendum from 18-19 October 2003 on the Romanian Constitution Law Review. Following the review, the Constitution was republished by the Legislative Council under article 152 of the Constitution, by updating the names and giving the texts a new numbering, in the Official Monitor no. 767 of 31 October 2003. See article 11, paragraph (1).

⁵See article 148, paragraph (2) of the Constitution of Romania republished.

court must apply the provisions of this legislative act in the situations that require the recognition and enforcement of a non-custodial legal decision and also the re-individualization of these criminal penalties.

5. References

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*** 2008/947/JHA Framework Decision of 27 November 2008 on the principle of mutual recognition to judgments and probation decisions in order to supervise the probation measures and alternative sanctions, published in the Official Journal of the European Union no. L 337/102 of 16 December 2008.

*** Lisbon Treaty signed on 13 December 2007. Consolidated version of the Treaty on European Union and the Treaty on functioning the European Union was published in the Official Journal of the European Union C 115 / 1, 09.05.2008.

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